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of Transportation  
**Federal Transit  
Administration**

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April 14, 2008

Charles and Dawnita Forell  
Forell Limousine & Bus Service  
106 West Prospect Avenue  
Pierre, South Dakota 57501

Ronald Baumgart  
Executive Director  
River Cities Public Transit  
PO Box 1025  
1600 East Dakota  
Pierre, South Dakota 57501

Re: Charter Service Docket No. 2006-02, Forell Limousine Service v. River Cities Transit

Dear Mr. and Mrs. Forell and Mr. Baumgart:

In response to the Forell Complaint lodged under Charter Service Docket No. 2006-02, the Federal Transit Administration has rendered a Decision, a copy of which is enclosed. Please note that this Decision applies the charter service regulations as they existed on October 5, 2005, the date on which the original Complaint was filed.

The parties are reminded that the Federal Transit Administration (FTA) amended the charter regulations in a Final Rule which appeared in the Federal Register on January 14, 2008. A copy of the Final Rule may be found on the FTA public website. This Final Rule requires that any private charter operators wishing to provide charter service register on FTA's Charter Registration Website:  
<http://www.fta.dot.gov/CharterRegistration>.

Should either party wish to appeal the Decision, the process is set out in 49 CFR 604.19 of the old rule and also in the Decision itself. As always, we are available to provide technical assistance with regard to the new Charter regulation.

Sincerely,

Terry J. Rosapep  
Regional Administrator

BEFORE THE FEDERAL TRANSIT ADMINISTRATION

Forell Limousine & Bus Service,  
Complainant

v.

Charter Service Docket No. 2006-02

River Cities Transit,  
Respondent

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**DECISION**

**I. COMPLAINT HISTORY**

**A. Forell Complaint**

Forell Limousine & Bus Service (Forell) filed a complaint with the Federal Transit Administration (FTA) on October 5, 2005 alleging that River Cities Transit (RCT) had been violating FTA's charter service regulations since 2004. Throughout its complaint, Forell alleged that RCT provided scores of impermissible charter service trips and an illegal taxi service without determining whether a private operator was willing and able to provide the services.<sup>1</sup>

With respect to the majority of the allegedly impermissible trips, Forell merely identified the date and the destination of the trip, followed by the statement "Inherently Charter."<sup>2</sup> For other trips, Forell generally claimed that RCT provided the service for a single group with a common purpose, under a single contract, and that the passengers acquired exclusive use of the bus—each an element necessary to establish a violation of FTA's charter service regulations at 49 C.F.R. Part 604. However, for each alleged impermissible charter service trip, Forell failed to provide FTA with facts or evidence to support its conclusion that each trip was for a "single group with a common purpose," "under a single contract," and that the passengers had "exclusive use of the bus." Forell did not explain to what extent each trip comported with each element of FTA's applicable charter service regulations.

**B. RCT Response**

RCT filed a response with FTA by letter dated November 18, 2005 and alleged that it was not providing impermissible charter service, but rather, that it was providing public transportation.<sup>3</sup> RCT admitted that it previously had provided a local taxi service, but it

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<sup>1</sup> Letter from Forell Limousine Bus Service (Forell) to the Federal Transit Administration (FTA), September 29, 2005, at 1-6

<sup>2</sup> *Id.* at 1-6

<sup>3</sup> Letter from River Cities Transit (RCT) to FTA, November 18, 2005, at 5-10

terminated this service in October 2004.<sup>4</sup> However, like Forell, RCT did not explain to what extent each allegedly impermissible charter service trip comported with each element of FTA's applicable charter service regulations.

RCT included with its submission an audit conducted by Mary Johnston, Senior Internal Auditor of the South Dakota Department of Transportation. Ms. Johnston applied FTA's charter service regulations to a series of RCT transit trips from August 2005 through September 2005.<sup>5</sup> The South Dakota Department of Transportation had been assisting RCT and Forell by providing technical assistance regarding charter service and by attempting to mediate between the parties.

### **C. Forell Reply**

Forell filed a reply with FTA by letter dated December 18, 2005 and further alleged that RCT was providing service that was "inherently charter."<sup>6</sup> In its letter, Forell did not provide FTA with facts or analysis to support its conclusion that RCT's service was inherently charter. Forell did not explain to what extent each trip comported with each element of FTA's applicable charter service regulations.

With its letter, Forell included copies of various RCT letters and advertisements corresponding to allegedly impermissible RCT charter service. Of the nine advertisements, only four indicated that RCT was providing the service. One of these four advertisements referred to RCT's taxi service, which it later discontinued,<sup>7</sup> a second referred to a series of concerts in 2004,<sup>8</sup> a third referred to RCT service to the Dakota State Fair Speedway which it advertised as "open to the general public,"<sup>9</sup> and a fourth referred to a "fan bus for Highmore/Harrold."<sup>10</sup> Forell filed further submissions to FTA by facsimile dated January 26, 2006.

### **D. Forell's New Complaint**

Forell filed a "Charter Bus Complaint Form" with FTA via facsimile on March 1, 2006. In the form, Forell alleged that RCT contracted with the Pierre Senior Citizens Home for service on November 8, 2005 and February 13, 2006 to the Grand River Casino and Resort at a fare of \$10.00 per person.<sup>11</sup> Forell further alleged that RCT did not determine whether a private operator was willing and able to provide the service.<sup>12</sup>

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<sup>4</sup> *Id.* at 3.

<sup>5</sup> South Dakota Department of Transportation, Audit of River Cities Transit Trips, October 13, 2005, at 1.

<sup>6</sup> Letter from Forell to FTA, December 18, 2005, at 1.

<sup>7</sup> *Id.* at 3.

<sup>8</sup> *Id.* at 7.

<sup>9</sup> *Id.* at 9.

<sup>10</sup> *Id.* at 10.

<sup>11</sup> Forell Charter Bus Complaint Form, March 1, 2006, at 1-2.

<sup>12</sup> *Id.* at 3.

**E. FTA Letter Narrowing Scope of Forell's Complaints**

After reviewing the submissions from Forell and RCT, and in an effort to focus Forell's complaints, FTA limited the scope of review to RCT's service operated from January 1, 2005 through March 1, 2006.<sup>13</sup> January 1, 2005 represented the point at which RCT discontinued its taxi service, and March 1, 2006 was the date of Forell's latest complaint. RCT submitted a response to Forell's March 1, 2006 complaint by e-mail dated March 21, 2006, and Forell responded by e-mail dated March 27, 2006.

**F. FTA's Requests for Additional Information**

After further review, FTA notified Forell and RCT that, although the parties, through their submissions, showed elements of possible charter service violations, FTA could not make a final determination in the matter until the parties evaluated each allegedly impermissible charter service trip against each element of FTA's applicable charter service regulations.<sup>14</sup> FTA requested that Forell provide a revised complaint to FTA in which Forell would evaluate each allegedly impermissible RCT charter service trip against each element of FTA's applicable charter service regulations.

By letter dated November 28, 2006, Forell responded to FTA's request by stating that, "[W]e have a business to run and cannot dedicate all of our time to assisting your investigation."<sup>15</sup> FTA replied by e-mail dated November 30, 2006 and stated that Forell had provided "insufficient information" with respect to each element of impermissible charter service and that FTA could not render a final decision.

Forell responded on February 9, 2007 by submitting another list of scores of RCT trips and general timeframes for other allegedly impermissible charter service.<sup>16</sup> The letter appeared substantially the same as its original complaint filed with FTA on October 5, 2005. Forell did not present new facts or evidence and did not explain to what extent each trip or each type of service comported with each element of FTA's applicable charter service regulations. RCT responded by letter dated March 21, 2007.

After further reviewing the submissions of each party, FTA concluded that it was not satisfied that it had facts sufficient to issue a final decision in the matter, but that some indications of potential charter service violations still existed. FTA requested from RCT copies of any contracts, advertisements, itineraries, and schedules corresponding to a list of RCT trips made within the scope of Forell's complaint, that is, between January 1, 2005 and March 1, 2006.<sup>17</sup>

<sup>13</sup> E-mail from FTA to Forell and RCT, March 21, 2006.

<sup>14</sup> Letter from FTA to Forell and RCT, November 2, 2006, at 1.

<sup>15</sup> Letter from Forell to FTA, November 28, 2006, at 1.

<sup>16</sup> Letter from Forell to FTA, February 9, 2007, at 1-5.

<sup>17</sup> Letter from FTA to RCT, January 11, 2008, at 1-2.

**G. Additional Submissions**

On January 28, 2008, RCT responded via e-mail to FTA's request for additional information. RCT provided FTA with (1) additional materials reflecting the South Dakota Department of Transportation's interpretation of FTA's charter service regulations; (2) a series of "Bus Driver's Report Cards"; (3) copies of written radio advertisements related to RCT's service; (4) a Transportation Agreement between the Oahe Child Development Center, Inc. and RCT; (5) copies of driver and passenger lists related to RCT's service; (6) a Lease Agreement between Dakota Bus and RCT; and (7) a series of RCT radio commercials corresponding to its service.

**II. STATUTORY AND REGULATORY FRAMEWORK****A. Applicable Regulation**

During the course of this proceeding, FTA commenced a negotiated rulemaking to revise FTA's charter service regulations.<sup>18</sup> FTA promulgated final regulations on January 14, 2008.<sup>19</sup> In this Decision, FTA applies the charter service regulations as they existed at 49 C.F.R. Part 604 on October 5, 2005—the date that Forell filed its original complaint with FTA.

**B. Statutory and Regulatory Framework****1. Charter Service**

In 1975, Congress amended the Urban Mass Transportation Act of 1964 to allow the Urban Mass Transportation Administration (UMTA), now FTA, to provide Federal financial assistance to a grantee if the grantee agrees not to provide charter service in a manner that forecloses private operators from providing charter service.<sup>20</sup> Those provisions are now codified, as amended, at 49 U.S.C. § 5323(d)(1), and they state:

Financial assistance under this chapter may be used to buy or operate a bus only if the applicant, governmental authority, or publicly owned operator that receives the assistance agrees that, except as provided in the agreement, the governmental authority or an operator of mass transportation for the governmental authority will not provide charter bus transportation service outside the urban area in which it provides regularly scheduled mass transportation service. An agreement shall provide for a fair arrangement the Secretary of Transportation considers appropriate to ensure that the assistance will not enable a

<sup>18</sup> Notice of Intent to Form a Negotiated Rulemaking Advisory Committee, 71 Fed. Reg. 5,037 (Jan. 31, 2006).

<sup>19</sup> Charter Service Final Rule, 73 Fed. Reg. 2,326-61 (Jan. 14, 2008).

<sup>20</sup> Amendments to the Urban Mass Transportation Act of 1964, Pub. L. No. 93-650, § (a), 88 Stat. 2-1 (1975) (codified as amended at 49 U.S.C. § 5323(d)).

governmental authority or an operator for a governmental authority to foreclose a private operator from providing intercity charter bus service if the private operator can provide the service.<sup>21</sup>

In 1976, UMTA promulgated regulations implementing the above statutory provisions. Those regulations are now codified as amended at 49 C.F.R. Part 604. Under 49 C.F.R. § 604.5(e), FTA defines "charter service" as:

[T]ransportation using buses or vans, or facilities funded under the Acts of a group of persons who pursuant to a common purpose, under a single contract, at a fixed charge (in accordance with the carrier's tariff) for the vehicle or service, have acquired the exclusive use of the vehicle or service to travel together under an itinerary either specified in advance or modified after having left the place of origin.<sup>22</sup>

Thus, the definition of charter service includes the following elements: (1) transportation using FTA-funded vehicles or facilities, (2) a group of people with a common purpose, (3) a single contract, (4) a fixed rate, (5) exclusive use, and (6) an itinerary either specified in advance or modified after having left the place of origin.

Under 49 C.F.R. § 604.7(b), an applicant for Federal financial assistance must agree that it will provide "charter service . . . only to the extent that there are no private charter service operators willing and able to provide the charter service . . ."<sup>23</sup> Under 49 C.F.R. § 604.9(a), if a recipient provides charter service using FTA-funded equipment or facilities, the recipient must first determine if there are private operators willing and able to provide the service.<sup>24</sup> If a private operator is willing and able to provide the service, the recipient cannot provide the service unless an exception applies under 49 C.F.R. § 604.9(b).<sup>25</sup>

Under 49 C.F.R. § 604.17(a), if FTA determines that a recipient violated FTA's charter service regulations under 49 C.F.R. Part 604, FTA may order such remedies as FTA determines are appropriate.<sup>26</sup>

## **2. Public Transportation**

When deciding a charter service case under 49 C.F.R. Part 604, FTA analyzes the grantee's service against the definition of "public transportation" at 49 U.S.C. §

<sup>21</sup> 49 U.S.C. § 5323(d)(1) (2006).

<sup>22</sup> 49 C.F.R. § 604.5(e) (2007).

<sup>23</sup> 49 C.F.R. § 604.7(b).

<sup>24</sup> 49 C.F.R. § 604.9(a).

<sup>25</sup> *Id.*

<sup>26</sup> 49 C.F.R. § 604.17(a).

5302(a)(10).<sup>27</sup> As opposed to FTA's definition of "charter service" which describes the type of service that FTA does not allow under 49 C.F.R. Part 604, Congress's definition of "public transportation" describes the type of service that FTA allows under 49 C.F.R. Part 604. Congress defines "public transportation" as "transportation by a conveyance that provides regular and continuing general or special transportation to the public, but does not include . . . charter . . . transportation."<sup>28</sup>

FTA has interpreted "public transportation" to include several key characteristics.<sup>29</sup> First, public transportation is transportation that is under the control of the recipient, meaning, the recipient is generally responsible for setting the route, rate, and schedule, and deciding what equipment is used. Compensation on the basis of hours or service is evidence of charter service, whereas individual fares paid by individual riders indicates that the service is public transportation.<sup>30</sup>

Second, public transportation is transportation that is designed to benefit the public at large and not some special organization, such as a private club. Riders outside a target group of customers must be eligible to use the service.<sup>31</sup>

Third, public transportation is transportation that is open to the public and is not closed door—anyone who wishes to ride on the service must be permitted to do so. In determining whether service is "open door," FTA looks at the level of ridership by the general public, as opposed to a particular group, and at the intent of the recipient offering the service.<sup>32</sup> The intent to make service "open door" can be discerned in the attempts to make the service known and available to the public.<sup>33</sup> FTA thus takes into account the efforts a recipient has made to market the service.<sup>34</sup> Generally, this marketing effort is best evidenced by publication of the service in the grantee's preprinted schedules.<sup>35</sup> FTA has also interpreted "open door" to mean a substantial public ridership and/or an attempt by the transit authority to widely market the service.<sup>36</sup>

### **C. Burden of Persuasion and Standard of Proof in a Charter Service Case**

When a statute is silent regarding a party's burden of persuasion, that is, which party loses if the evidence is closely balanced, the default rule is that the plaintiff or claimant

<sup>27</sup> See, e.g., *Motorcoach Marketing International, Inc. v. Metropolitan Transit Authority of Harris County*, 1, 2 (Oct. 28, 2003).

<sup>28</sup> 49 U.S.C. § 5302(a)(10) (2006).

<sup>29</sup> 52 Fed. Reg. 11,916, 11,920 (Apr. 13, 1987).

<sup>30</sup> *Seymour Charter Bus Lines v. Knoxville Transit Authority*, Charter Service Case No. TN-09/88-01, 1, 9-10 (Nov. 29, 1989).

<sup>31</sup> *Annett Bus Lines v. City of Tallahassee*, Charter Service Case No. FL-TALTRAN/90-02-01, 1, 3 (Apr. 28, 1992).

<sup>32</sup> *Washington Motor Coach Association v. Municipality of Metropolitan Seattle*, Charter Service Case No. WA-09/87-01 1, 10 (Mar. 21, 1988).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Blue Grass Tours and Charter v. Lexington Transit Authority*, Charter Service Case No. URO-III-1987, 1, 5 (May 17, 1988).

bears the burden of persuasion.<sup>37</sup> Thus, in a charter service case, where Congress was silent regarding which party bears the burden of persuasion, the complainant bears the burden of persuasion with respect to each element of the complainant's case.

When a statute is silent regarding the standard of proof that should apply in a case, "the preponderance of the evidence is the proper standard, as it is the default standard in civil and administrative proceedings."<sup>38</sup> Therefore, when deciding a charter service case, where Congress was silent regarding the standard of proof, FTA utilizes a preponderance of the evidence standard. To hold something by a preponderance of the evidence means that something is more likely so than not so.<sup>39</sup>

### III. DISCUSSION

#### A. Background

At the outset, FTA notes that neither party applied the alleged facts of this case to the elements set forth in 49 C.F.R. Part 604, even when specifically and repeatedly requested by FTA. RCT submitted to FTA materials reflecting, to a very small extent, the South Dakota Department of Transportation's analysis of some of RCT's service with respect to 49 CFR Part 604. However, FTA is not bound by a state's analysis of FTA's charter service regulations at 49 C.F.R. Part 604.

#### B. Alleged Impermissible Charter Service Trips

##### 1. Trips to and from Local Airports

In its amended complaint, Forell alleged that RCT provided impermissible charter service from local airports to various locations in the Pierre, South Dakota area. Forell alleged that RCT provided the service with FTA-funded vehicles at a fixed charge of \$5.00 per person and \$1.50 per mile for travel outside of the local service area.

Forell also alleged that RCT provided the service to a group of persons with a common purpose, although Forell did not identify the group of persons and Forell merely claimed that the purpose of the service was to transport people from the airport. In its response dated March 21, 2007, RCT claimed that it provided "demand responsive" service from the airports, that is, service for individual passengers to individual destinations based on a request for the service from each passenger. FTA finds that RCT did not provide service to a group of persons, but rather, individuals, and thus, there was no common purpose.

Forell alleged that RCT provided the service pursuant to a single contract. In its response dated March 21, 2007, RCT claimed that it did not contract with any airline to provide the service at issue. Furthermore, after a request from FTA on January 11,

<sup>37</sup> Schaffer *ex rel* Schaffer v. Weast, 546 U.S. 49, 56 (2005).

<sup>38</sup> Yzaguirre v. Barnhart, 58 Fed.Appx. 460, 462 (10th Cir. 2003) (quoting Jones *ex rel* Jones v. Chater, 101 F.3d 509, 512 (7th Cir. 1996)).

<sup>39</sup> See, e.g., Williams v. Eau Claire Public Schools, 397 F.3d 441, 444 (6th Cir. 2005).



2008 to provide FTA with a copy of any contract related to airport service, RCT provided FTA with no copies of contracts related to airport service. Thus, FTA finds that RCT did not provide the airport service at issue pursuant to a single contract.

Forell alleged that the passengers of RCT's airport service obtained exclusive use of RCT's vehicles for the service. The evidence, however, does not demonstrate that the passengers had exclusive use of RCT's vehicles. In RCT's demand response system, RCT drivers could have made multiple stops along the airport routes to pickup and drop off passengers as they requested the service. An individual may not have had exclusive use of the vehicle. FTA finds that Forell has not proved by a preponderance of the evidence that RCT passengers had exclusive use of RCT's vehicles.

RCT's airport service is more akin to public transportation. First, RCT controlled the service by responding to individual requests from individual passengers—there is no evidence that any outside group controlled the routes and rates. Second, RCT did not design its airport service to benefit a special organization, but rather, RCT designed its airport service to benefit the public at large. Third, RCT made its service open to the public. Under its demand response system, RCT provided airport transportation to any member of the public who wanted to utilize the service.

Forell has proved some elements of impermissible charter service, but not all. Therefore, FTA finds that RCT did not violate FTA's charter service regulations under 49 C.F.R. Part 604 with respect to its airport service.

## **2. Roundtrip Service from the Discovery Center to Melvin Ranch**

In its amended complaint, Forell alleged that RCT provided impermissible roundtrip charter service from the Discovery Center to Melvin Ranch. Forell alleged that RCT provided the service for a group of children pursuant to the common purpose of visiting the Discovery Center and Melvin Ranch at a fixed charge of \$74.40 for the service. Forell implied that RCT provided the service with FTA-funded vehicles, under a contract with the Discovery Center with an itinerary specified in advance, and that the passengers had exclusive use of the vehicles.

In its response dated March 21, 2007, RCT claimed that the service at issue was demand response service. RCT claimed that the rides were scheduled in advance like its other demand response trips.

After considering both arguments, and based on the limited facts presented to FTA, FTA finds that it is not clear what type of arrangement was designed to transport the passengers, and it is not clear whether the passengers had exclusive use of the vehicles. Forell has not proved by a preponderance of the evidence that RCT provided impermissible charter service under 49 C.F.R. Part 604 with respect to its roundtrip service from the Discovery Center to Melvin Ranch.

### **3. Trips to and from Car Races**

In its amended complaint, Forell alleged that RCT provided impermissible charter service trips to and from car races in Huron, South Dakota and Miller, South Dakota. Forell alleged that RCT provided the transportation using FTA-funded vehicles for a group of people pursuant to the common purpose of attending car races.

RCT did not dispute these facts. However, in its response dated March 21, 2007, RCT indicated that the service was open to the public on a first-come first-serve basis, and that it did not operate the service pursuant to a single contract. RCT operated routes to and from the races with scheduled stopping points along the route paths. Furthermore, in its e-mails to FTA dated January 29, 2008, RCT provided FTA with five radio commercials and a series of radio commercial scripts which all indicate that RCT's service to local car races was open to the public and that no group of passengers acquired exclusive use of the vehicles.

RCT's service to and from car races is more akin to public transportation. First, RCT controlled the service, particularly the routes—there is no evidence that any outside group controlled the routes and rates. Second, RCT did not design its service to and from car races to benefit a special organization, but rather, RCT designed this service to benefit the public at large. Third, RCT made its service open to any member of the public, and widely advertised this service through various radio commercials.

Thus, although some elements of charter service are met, under 49 C.F.R. § 604.5(e), FTA finds that these facts tend to show that RCT's race car service was not impermissible charter service because it was not pursuant to a single contract and the passengers did not acquire the exclusive use of the vehicle, but rather, the service was open to the public.

### **4. Trips to and from Sutton Bay Private Club and Resort**

In its amended complaint, Forell alleged that RCT provided impermissible charter service trips to and from Capital City Air Carrier, which is located at the Pierre Regional Airport, and Sutton Bay, which is a local golf course and hunting ground. Forell alleged that RCT used vehicles which were funded with Federal money, pursuant to the common purpose of golfing and hunting, under a single contract with Sutton Bay, at a fixed price of \$5.00 per person and \$1.50 per mile outside of the local service area, and that RCT provided the passengers with exclusive use of the vehicles for these trips.

RCT did not deny these facts. Furthermore, under 49 C.F.R. § 604.5(e), because RCT provided the service to and from a specific location, the passengers likely utilized an itinerary specified in advance. Thus, FTA finds that each element of charter service under 49 C.F.R. § 604.5(e) is satisfied, and RCT's Sutton Bay service was charter service.

Because RCT's Sutton Bay service was charter service, under 49 C.F.R. § 604.9(a) and 49 C.F.R. § 604.11, RCT first should have determined whether there was at least one

private operator willing and able to provide the service. RCT never indicated to FTA that it complied with these regulations, and Forell indicated throughout its submissions that it was willing and able to provide the service subject to its complaints. Thus, FTA finds that RCT provided impermissible charter service and violated FTA's charter service regulations under 49 C.F.R. Part 604 because it did not allow at least one private operator, such as Forell, the opportunity to provide the Sutton Bay charter service.

## **5. Trips to and from the Boys & Girls Club**

In its amended complaint, Forell alleged that RCT provided impermissible charter service trips to and from a local Boys & Girls Club. Forell alleged that RCT provided the service with FTA-funded vehicles, pursuant to the common purpose of making each trip, under a single contract, for a fixed charge, and that the passengers had exclusive use of the vehicle.

RCT did not deny that it provided charter service. Indeed, RCT provided the service with FTA-funded vehicles, and the passengers utilized the service with the common purpose of making each trip. Additionally, RCT provided FTA with a series of passenger lists for Boys & Girls Club trips, each marked with the words, "Contract with YMCA & Boys & Girls Club." These facts indicate that RCT provided the service pursuant to a contract, and presumably, for a fixed charge. The passengers had exclusive use of the vehicles, and because RCT provided the service to and from a specific location, the passengers likely traveled together under an itinerary specified in advance of each trip. Thus, FTA finds that the Boys & Girls Club service was charter service.

RCT argued, however, that its service qualified for an exception to the prohibition on charter service. Under 49 C.F.R. § 604.9(b)(5)(ii), a recipient may contract to provide charter service with a non-profit organization exempt from taxation if the non-profit organization certifies that (1) it is exempt from taxation under subsection 501(c)(1), 501(c)(3), 501(c)(4), or 501(c)(19) of the Internal Revenue Code; (2) it is a qualified social service agency under appendix A of 49 C.F.R. Part 604, as a recipient of funds, either directly or indirectly, under one or more of the Federal programs listed in appendix A; (3) it requested a charter service trip consistent with the function and purpose of the non-profit organization; and (4) it will organize and operate the trip in compliance with Title VI of the Civil Rights Act of 1964, Section 19 of the Federal Mass Transit Act of 1964 and 49 C.F.R. Part 27, or 45 C.F.R. Part 80.<sup>40</sup>

RCT provided FTA with a copy of a certification from the Boys & Girls Club that it is exempt from taxation under subsection 501(c)(3) of the Internal Revenue Code. In its certification, the Boys & Girls Club implied that the purpose of the transportation was to serve the children of the Pierre community, and presumably, this purpose is consistent with the function and purpose of the Boys & Girls Club. Additionally, RCT provided FTA with a copy of a certification from the Boys & Girls Club that the charter service trips at

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<sup>40</sup> 49 C.F.R. § 604.9(b)(5)(ii)

issue were organized and operated in compliance with Title VI of the Civil Rights Act of 1964, Section 19 of the Federal Mass Transit Act of 1964 and 49 C.F.R. Part 27, or 45 C.F.R. Part 80.

With respect to the second prong of the exception, the Boys & Girls Club stated that it received "Nutritional Services dollars" and it received funding "from the Division of Developmental Disabilities." Neither of these programs, however, is listed in appendix A of 49 C.F.R. Part 604. Thus, FTA finds that RCT's Boys & Girls Club service does not qualify for an exception under 49 C.F.R. § 604.9(b)(5)(ii).

Because the Boys & Girls Club service was charter service, and because no exception applies, under 49 C.F.R. § 604.9(a) and 49 C.F.R. § 604.11, RCT should have determined whether there was at least one private operator willing and able to provide the service. RCT never indicated to FTA that it complied with these regulations, and Forell indicated throughout its submissions that it was willing and able to provide the service subject to its complaints. Therefore, FTA finds that RCT violated 49 C.F.R. Part 604 with respect to the Boys & Girls Club service.

## **6. Trips to and from the YMCA**

In its submission dated November 18, 2005, RCT indicated to FTA that it contracted with a local branch of the YMCA to provide afterschool transportation and some summer recreation transportation service. RCT indicated that it provided drivers, insurance, and repairs, but the YMCA provided the buses for the service.

Under 49 C.F.R. § 604.5(e), FTA defines "charter service" as "transportation using buses or vans, or facilities funded under the Acts . . ."<sup>41</sup> Based on RCT's submission, RCT did not provide the YMCA service using buses "funded under the Acts," but rather, RCT used buses provided by the YMCA. Thus, FTA finds that, although RCT may have contracted with a local branch of the YMCA to provide bus service, the buses were not FTA-funded buses and the service was not impermissible charter service under 49 C.F.R. Part 604.

FTA notes that a grantee may violate 49 C.F.R. § 604.5(e) if it uses a facility funded by FTA to provide transportation. Based on the evidence of record, RCT admitted that it made repairs to YMCA buses; however, FTA does not know whether RCT made repairs to the YMCA buses using a facility funded by FTA. Forell carries the burden of persuasion on this issue, and FTA finds that Forell has not satisfied its burden of persuasion here.

## **7. "Fan Bus" Trips**

In its amended complaint, Forell alleged that RCT provided impermissible charter service trips to various sporting events, referred to as "fan bus" trips, on September 9, 2005 and October 14, 2005. Forell alleged that RCT provided the service using FTA-

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<sup>41</sup> 49 C.F.R. § 604.5(e)

funded vehicles, for a group of persons with the common purpose of attending the sporting events, and that the passengers had exclusive use of the vehicle.

Under 49 C.F.R. § 604.5(e), these facts satisfy three of the six elements of charter service. Furthermore, because RCT provided the trips to and from a specific location, passengers likely utilized an itinerary specified in advance of each trip.

However, the facts do not demonstrate that all of the elements of charter service are met. Forell alleged that RCT provided the sporting events trips pursuant to a single contract. However, on September 9, 2005, ten individual passengers each paid a \$16.00 fare for the service. Additionally, on October 14, 2005, eleven individual passengers each paid a \$15.00 fare for the service. Clearly, RCT provided the service to individuals, not a single organized group pursuant to a single contract. Furthermore, in one United States District Court case, *Blue Bird Coach Lines, Inc. v. Linton*,<sup>42</sup> the court struck down the complainants' argument that, where individual members of the public each paid \$15.00 for roundtrip service to professional sporting events, all of the individual passengers transformed into a single group and their fares combined into a single contract for a fixed charge. Thus, FTA finds that the fan bus trips did not violate FTA's charter service regulations under 49 C.F.R. Part 604 because no single contract existed.

#### **8. Roundtrip Service from the Pierre Senior Citizens Center to the Grand River Casino**

In its "Charter Bus Complaint Form" and in its amended complaint, Forell alleged that RCT provided impermissible roundtrip charter service from the Pierre Senior Citizens Center to the Grand River Casino on November 8, 2005 and February 13, 2006. Forell alleged that RCT provided the service using FTA-funded vehicles, for a group of persons pursuant to the common purpose of patronizing the casino, under a single contract, at a fixed rate, and that the passengers had exclusive use of the vehicles. Furthermore, because RCT provided the trips to and from a specific location, the passengers likely utilized an itinerary specified in advance of each trip.

In its e-mail response dated March 21, 2006, RCT did not deny that its Pierre Senior Citizens Center service was charter service, but rather, argued that the charter service qualified for an exception to the charter service prohibition. Under 49 C.F.R. § 604.9(b)(6), a recipient may contract with a non-profit organization exempt from taxation if the non-profit organization certifies that (1) it is a non-profit organization exempt from taxation under subsection 501(c)(1), 501(c)(3), 501(c)(4), or 501(c)(19) of the Internal Revenue Code; (2) more than 50% of the passengers on the charter trip will be elderly; (3) the charter trip is consistent with the function and purpose of the non-profit organization; and (4) the non-profit organization will organize and operate the trip in compliance with Title VI of the Civil Rights Act of 1964, Section 19 of the Federal Mass Transit Act of 1964, 49 C.F.R. Part 27, or 45 C.F.R. Part 80.<sup>43</sup>

<sup>42</sup> 48 F Supp.2d 47, 48-49, 51 (D.D.C. 1999)

<sup>43</sup> 49 C.F.R. § 604.9(b)(6)

RCT provided FTA with a copy of a certification from the Pierre Senior Citizens Center that it is exempt from taxation under subsection 501(c)(3) of the Internal Revenue Code. Additionally, RCT provided FTA with a copy of a certification from the Pierre Senior Citizens Center that the charter service trips at issue were organized and operated in compliance with Title VI of the Civil Rights Act of 1964, Section 19 of the Federal Mass Transit Act of 1964 and 49 C.F.R. Part 27, or 45 C.F.R. Part 80.

However, with respect to the second and third prongs of the exception, RCT did not provide FTA with a certification from the Pierre Senior Citizens Center that more than 50% of the passengers on the trips were elderly, and RCT did not provide FTA with a certification from the Pierre Senior Citizens Center that trips to a casino were consistent with the function and purpose of the senior citizens center. Thus, FTA finds that the Pierre Senior Citizens Center service was charter service not subject to any exception under 49 C.F.R. § 604.9(b)(6).

Because the Pierre Senior Citizens Center service was impermissible charter service, and because no exception applies, under 49 C.F.R. § 604.9(a) and 49 C.F.R. § 604.11, RCT should have determined whether there was at least one private operator willing and able to provide the service. RCT never indicated to FTA that it complied with these regulations, and Forell indicated throughout its submissions that it was willing and able to provide the service subject to its complaints. Therefore, FTA finds that RCT violated 49 C.F.R. Part 604 with respect to the Pierre Senior Citizens Center service.

#### **9. Trips to and from Rallies and Concerts Related to Sturgis Bike Week**

In its amended complaint, Forell listed, among a series of allegedly impermissible charter service trips, RCT service to rallies and concerts related to Sturgis Bike Week. However, Forell did not allege (1) that RCT used buses, vans, or facilities funded under the Acts to provide the transportation; (2) that RCT provided the service for a group of persons pursuant to a common purpose; (3) that a single contract existed regarding the transportation; (4) that RCT provided the service pursuant to a fixed charge; (5) that the passengers acquired exclusive use of the vehicle or service; and (6) that the passengers traveled together under an itinerary either specified in advance or modified after having left its place of origin.

Having failed to allege that RCT's service satisfied each element of FTA's definition of impermissible charter service, and having presented no evidence on the matter, Forell did not prove by a preponderance of the evidence that RCT engaged in impermissible charter service. Thus, based on the evidence of record, FTA finds that RCT's service to and from rallies and concerts related to Sturgis Bike Week did not violate FTA's charter service regulations under 49 C.F.R. Part 604.

#### **IV. DECISION**

Based on the evidence of record FTA finds that RCT violated FTA's charter service regulations under 49 C.F.R. Part 604 with respect to the following service: (1) trips to

and from Sutton Bay Private Club and Resort, (2) trips to and from the Boys & Girls Club, and (3) roundtrip service from the Pierre Senior Citizens Center to the Grand River Casino.

Based on the evidence of record, FTA finds that RCT did not violate FTA's charter service regulations under 49 C.F.R. Part 604 with respect to the following service: (1) trips to and from local airports, (2) roundtrip service from the Discovery Center to Melvin Ranch, (3) trips to and from car races, (4) trips to and from the YMCA, (5) "fan bus" trips, and (6) trips to and from rallies and concerts related to Sturgis Bike Week.

Because the scope of FTA's Decision applies to RCT's service from January 1, 2005 through March 1, 2006, and because FTA promulgated a new regulatory framework to govern charter service, FTA does not believe that a monetary penalty is appropriate.

### Appeal Process

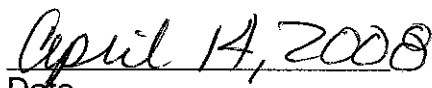
In accordance with 49 CFR § 604.19, a party adversely affected by this decision may appeal within ten days of receipt of this decision. The appeal should be sent to James Simpson, Administrator, Federal Transit Administration, 1200 New Jersey Avenue, SE, Washington, DC 20590.

### V. NEW CHARTER SERVICE REGULATIONS

In light of FTA's recent charter service rulemaking, FTA directs Forell and RCT to FTA's new charter service regulations at 49 C.F.R. Part 604.<sup>44</sup> FTA instructs each party to familiarize itself with the entire regulatory framework under 49 C.F.R. Part 604, and in light of this case, FTA highlights the following provisions:

- Section 604.3, Definitions of "Charter Service" and "Demand Response";
- Section 604.13, Registration of Private Charter Operators;
- Section 604.14, Recipient's Notification to Registered Charter Providers;
- Section 604.27, Complaints, Answers, Replies, and Other Documents;
- Section 604.30, Filing Complaints;
- Section 604.47, Remedies; and
- Appendix C, Charter Service Questions and Answers.

  
Terry J. Rosapep  
Regional Administrator

  
Date

<sup>44</sup> See Charter Service Final Rule, 73 Fed. Reg. 2,326-61 (Jan. 14, 2008).